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Via facsimile and regular mail

MEMORANDUM OFFICE OF THE
EXECUTIVE SECRETARY

To: Hon. Jonathan Wike
Hearing Officer

From: James Lister ^{ghl} and Andrew Pulliam (Ten Bar No. A-16863)
Counsel for VarTec Telecom, Inc.

cc: Joelle Phillips, Esq.
Guy Hicks, Esq.
Wayne McGraw, Esq.
Counsel for BellSouth Telecommunications, Inc.

Re: BellSouth v. VarTec (Docket 01-0906)
Removal to U.S. District Court for the Middle District of Tennessee

Date: November 15, 2001

As you know, on November 13, 2001, VarTec Telecom, Inc. ("VarTec") filed a Notice of Removal of the complaint case filed by BellSouth Telecommunications, Inc. ("BellSouth") with the Tennessee Regulatory Authority to the U.S. District Court for the Middle District of Tennessee. The District Court has assigned Civil Action No. 3-01-1491 to the case.

Because removal of a case from the Commission is not an everyday occurrence, we are attaching for ease of reference excerpts from Moore's Federal Practice discussing the removal of cases from state administrative agencies and describing the procedure that applies following the filing of a Notice of Removal.¹ Essentially, the removal shifts jurisdiction to the U.S. District Court, pending resolution of any Motion to Remand that BellSouth may choose to file.

VarTec did not take this step lightly but only after careful consideration of the nature of the dispute and also the potential for substantial cost savings if this case and cases filed by BellSouth with three other state commissions (which VarTec also removed) are consolidated. A review of the Complaint indicates that it is a suit for \$1,052,038 by a carrier (BellSouth) against a customer (VarTec) based on an alleged breach of tariff -- the telecommunications equivalent of breach of contract. BellSouth claims it was not paid

¹ The excerpts provide citations to cases on these issues.

the full amount it says is due for its services. There are no requests for changes in regulatory policy. The suit appears to be a proper matter for consideration by a court.²

Given the presence of federal jurisdiction, including diversity jurisdiction (VarTec is a Texas corporation with its principal place of business in Dallas), as well as the potential for consolidation and efficiencies discussed above, VarTec elected to file the removal papers.

We hope this memorandum has been helpful

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² Indeed, BellSouth several months ago presented VarTec with a draft complaint to be filed in U.S. District Court covering all of BellSouth's Percentage of Interstate Use ("PIU") claims in multiple states. BellSouth has since filed complaints in multiple states but not in Georgia and Louisiana, where BellSouth has acknowledged that VarTec underreported PIU, such that BellSouth would owe VarTec a refund following an audit.

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former rule, for example, a state court action over which the federal courts have exclusive jurisdiction, such as quiet title actions against the federal government, could not be removed because the state court lacked subject matter jurisdiction.⁹

The Judicial Improvements Act of 1985 added a new subsection to the general removal statute, removing this jurisdictional roadblock. Currently, a federal court is not precluded from hearing and determining any claim in a civil action because the state court from which the action was removed lacked jurisdiction over the claim.¹⁰

[3]—When Administrative Proceedings May Be Removed

State administrative bodies may be treated as state courts for removal purposes, provided that these bodies are involved in essentially judicial functions.¹¹ Thus, removal of an administrative proceeding may be proper if the proceeding is adversarial or punitive, and disputed matters are being adjudicated.¹² Even when the state agency's administrative findings are subject to deferential on-the-record review, the case may be removable.^{12.1} For example, in *City of Chicago v. International College of Surgeons*, the plaintiffs owned property in a landmark district in Chicago. They applied to the Landmarks Commission for the necessary permits to allow demolition of a designated landmark on their property. The Commission denied the permits. The plaintiffs appealed the denials to state court pursuant to the state Administrative Review Law, raising federal constitutional claims. The defendants removed the case to federal district court. On appeal from summary judgment for the defendants, the Seventh Circuit, following the First and Fourth Circuits, concluded that the case was not a "civil action" properly

⁹ No removal of case filed in state court when case subject to exclusive federal jurisdiction.

5th Circuit Cummings v. United States, 648 F.2d 289, 291 (5th Cir. 1981).

9th Circuit See Clorox Co. v. U.S. Dist. Ct. for N.D. of California, 779 F.2d 517, 521-522 (9th Cir. 1985).

¹⁰ Federal court's removal jurisdiction not derivative of state court. 28 U.S.C. § 1441(e); see *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 801 (9th Cir. 1987).

¹¹ State administrative body treated as state court when involved in judicial functions. *Floeter v. C.W. Transp., Inc.*, 597 F.2d 1100, 1101-1102 (7th Cir. 1979).

¹² Removal proper when proceeding is adversarial.

4th Circuit Kolibash v. Committee on Legal Ethics, 872 F.2d 571, 576 (4th Cir. 1989).

7th Circuit Floeter v. C.W. Transp., Inc., 597 F.2d 1100, 1101-1102 (7th Cir. 1979).

^{12.1} Removal even if findings subject to deferential review. *City of Chicago v. International College of Surgeons*, — U.S. —, 118 S. Ct. 523, 531-534, 139 L. Ed. 2d 525 (1997) (case raising federal claims and state claims calling for review of deferential on-the-record administrative findings is removable).

removable because federal courts lack jurisdiction over claims for state administrative agency review. Thus, the court held that the case, although it included federal claims, could not be removed. The Supreme Court reversed. According to the Court, the federal question claims unquestionably formed a "civil action" for the purposes of removal, and that the supplemental jurisdiction statute, § 1367, provided the basis for the removal of the state law administrative review claims.^{12.2}

Of course, the Court also noted that even though the state administrative review claims are properly removed via § 1441(a) and § 1367(a), the district court may exercise its discretion under § 1367(c) and refuse to exercise jurisdiction, or may abstain in appropriate cases. It may then remand the claims.^{12.3}

Some administrative proceedings may not be removed. For example, if the administrative body lacks authority to award damages or issue injunctions, the proceedings may not be removed.¹³ Similarly, if the administrative proceedings are primarily concerned with promulgating rules or policy, such proceedings are not removable.¹⁴

12.2 Federal question claims formed "civil action" for purposes of removal. *City of Chicago v. International College of Surgeons*, — U.S. —, 118 S. Ct. 523, 531-534, 139 L. Ed. 2d 525 (1997); see 28 U.S.C. § 1367 (supplemental jurisdiction statute).

12.3 District court may nevertheless abstain or refuse to exercise jurisdiction. *City of Chicago v. International College of Surgeons*, — U.S. —, 118 S. Ct. 523, 533-534, 139 L. Ed. 2d 525 (1997) ("Depending on a host of factors, then—including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between the state and federal claims—district courts may decline to exercise jurisdiction over supplemental state law claims"); see *Carnegie Mellon Univ. v. Cohill*, 484 U.S. 343, 350-351, 108 S. Ct. 614, 98 L. Ed. 2d 720 (1988) (federal district court had discretion to remand to state court removed case involving pendent claims after determining that retaining jurisdiction over case would be inappropriate); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, —, 116 S. Ct. 1712, 135 L. Ed. 2d 1, 21-22 (1996) (when equitable or other discretionary relief is being sought, federal courts, in otherwise appropriate circumstances, may decline to exercise jurisdiction altogether by either dismissing suit or remanding it to state court; but federal courts may only stay actions for damages based on abstention principles, and may not dismiss or remand such actions).

13 No removal if administrative body cannot award damages or issue injunctions. *Sun Buick, Inc. v. Saab Cars USA, Inc.*, 26 F.3d 1259, 1263-1265 (3d Cir. 1994) (board could only assess limited fines and lacked judicial characteristics, such as disinterestedness, separation from executive, and legal acumen).

14 No removal if proceedings concerned with making rules or policy. *Volkswagen de Puerto Rico, Inc. v. Puerto Rico Labor Relations Bd.*, 454 F.2d 38, 44 (1st Cir. 1972).

attempt fails, a later served defendant may file a second notice of removal.¹⁰⁴ However, if circumstances in the case have not changed, a second attempt may leave the defendant open to sanctions (*see* § 107.41[3]).

§ 107.31 Effect of Removal

[1]—Federal Court May Issue All Orders and Process Necessary

After removal, the federal court may issue all orders necessary for the proper advancement of the removed case.¹ Removal is automatically effected by the filing of a notice of removal with the district court, the state court, and the parties;² the federal court need not issue any specific order to complete removal.³

[2]—State Court Divested of Jurisdiction

Once a copy of the notice of removal is filed with the clerk of the state court in which the action is pending (*see* § 107.30[2][b]), the state court is divested of jurisdiction. The state court must stop all proceedings unless and until the case is remanded.⁴ Any state court action after the filing of the removal notice is void, even if the case is subsequently remanded because the initial removal was improper.⁵ Further, the state court has no authority to act after a federal court dismisses rather than remands a case.⁶

¹⁰⁴ Later served defendant may file second notice of removal. *Brierly v. Alusuisse Flexible Packaging, Inc.*, 184 F.3d 527, 531–532 (6th Cir. 1999), *cert. denied*, 528 U.S. 1076 (1999).

¹ Federal court may issue all necessary orders after removal. *See* *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 437, 94 S. Ct. 1113, 39 L. Ed. 2d 435 (1974).

4th Circuit *Burroughs v. Palumbo*, 871 F. Supp. 870 (E.D. Va. 1994) (federal court obtains jurisdiction when defendant files removal notice in federal court).

8th Circuit *Myers v. Moore Engineering, Inc.*, 42 F.3d 452, 454–455 (8th Cir. 1994) (federal court may grant renewed summary judgment motion previously denied in state court).

² 28 U.S.C. § 1446(d).

³ No federal order required for removal. *See* *Rollwitz v. Burlington N. R.R.*, 507 F. Supp. 582, 584 (D.C. Mont. 1981).

⁴ State court divested of jurisdiction. 28 U.S.C. § 1446(d).

1st Circuit *See* *Rollwitz v. Burlington N. R.R.*, 507 F. Supp. 582, 584 (D.C. Mont. 1981) (no federal order required to effect removal).

4th Circuit *Burroughs v. Palumbo*, 871 F. Supp. 870 (E.D. Va. 1994) (state is divested of jurisdiction when removal notice is filed in state court).

8th Circuit *Windac Corp. v. Clarke*, 530 F. Supp. 812, 813 (D. Neb. 1982).

⁵ State court actions void after removal notice. *See, e.g.*, *Allstate Ins. Co. v. Superior Ct.*, 132 Cal. App. 3d 670, 676, 183 Cal. Rptr. 330 (1982).

⁶ State court lacks authority after federal court dismisses removed case. *Murray v. Ford*

(*Matthew Bender & Co., Inc.*)

(Rel.130-6/01 Pub.410)

Despite this prohibition, courts have held that the "proceed no further" language does not extend to bar state courts from performing ministerial acts that do not affect the merits of the dispute between the parties. If the contrary were true, state courts would be forever prohibited from taking any act regarding a removed case (assuming no remand). This bar would include actions such as the routine destruction of old files, allowing parties to remove documents for proper legal purposes, or any similar action that requires a court order.^{6.1} For example, a state court may assess and collect accrued court costs after removal from a plaintiff who signed a cost bond because the state court's action is not inconsistent with the federal statute mandating that the state court proceed no further.^{6.2}

[3]—Effect of Prior State Court Orders

In general, the federal court takes the case on removal exactly as the case stood in state court.⁷ Accordingly, the state court pleadings, any discovery had, orders entered, or proceedings will be presumed valid by the district court.⁸ Thus,

Motor Co., 770 F.2d 461, 463 (5th Cir. 1985) (state court cannot set aside default judgment after removal notice).

6.1 State court ministerial acts may be permitted after removal.

3d Circuit *Master Equip., Inc. v. Home Ins. Co.*, 342 F. Supp. 549, 552 (E.D. Pa. 1972) (state court could correct its own records to remove default judgment that federal court would otherwise order stricken).

6th Circuit *Lawrence v. Chancery Court*, 188 F.3d 687, 692-693 (6th Cir. 1999) (citing *Moore's*).

6.2 Collection of state court costs secured by bond.

6th Circuit *Lawrence v. Chancery Court*, 188 F.3d 687, 692-693 (6th Cir. 1999) (citing *Moore's*; because Tennessee chancery court's action could have been found outside federal court authority, action did not impermissibly infringe on federal court jurisdiction).

8th Circuit *See Pershern v. Fiatallis N. Am., Inc.*, 834 F.2d 136, 140 (8th Cir. 1987) (28 U.S.C. § 1920, authorizing awards of costs, does not account for state court filing fees).

7 Federal court takes case as it stood in state court.

4th Circuit *Burroughs v. Palumbo*, 871 F. Supp. 870 (E.D. Va. 1994) (between time that removal notice filed in federal court and subsequently in state court, both courts share concurrent jurisdiction; default judgment valid state court order).

8th Circuit *See Palmisano v. Allina Health Sys., Inc.*, 190 F.3d 881, 885 (8th Cir. 1999) (after removal, state court orders remain in effect).

9th Circuit *See Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 578 (N.D. Cal. 1981), *aff'd in part*, 731 F.2d 1423 (1984).

⁸ **State court pleadings, discovery, orders, or proceedings presumed valid.** *Instituto per lo Sviluppo Economico Dell'Italia Meridionale v. Sperti Prods., Inc.*, 47 F.R.D. 310, 312 (S.D.N.Y. 1969).